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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.
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14 EDGAR OMAR HERRERA FARIAS,

15 Defendant.
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4:15-CR-06049-EFS-16

UNITED STATES'
SUPPLEMENTAL
MEMORANDUM AS TO WAIVER
OF ATTORNEY CLIENT
PRIVILEGE AND REQUEST FOR
TAILORED ORDER DIRECTING
DISCLOSURE OF PRIVILEGED
COMMUNICATIONS AS TO
CLAIMS RAISED IN ECF 1278

19 Plaintiff, United States of America, by and through, William D. Hyslop,
20 United States Attorney for the Eastern District of Washington, and Stephanie Van
21 Marter, Assistant United States Attorney for the Eastern District of Washington,
22 submits the following supplemental memorandum as to whether the Defendant has
23 waived his attorney client privilege by the filing of his motion to withdraw guilty
24 plea. (ECF. 1278).
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1 **I. DEFENDANT HAS WAIVED HIS ATTORNEY CLIENT**
2 **PRIVILEGE THUS A TAILORED ORDER DIRECTING**
3 **DISCLOSURE IS WARRANTED**

4 A defendant waives attorney-client privilege when she engages in select
5 conduct or advances select arguments. See *Bittaker v. Woodford*, 331 F.3d 715,
6 718–20 (9th Cir. 2003) (en banc). Waiver by conduct occurs “when a party
7 discloses privileged information to a third party who is not bound by the privilege
8” *Id.* at 719; see also *United States v. Davis*, 583 F.3d 1081, 1090 (8th Cir.
9 2009), cert. denied, 130 S. Ct. 1555 (2010). Such conduct includes testifying at a
10 hearing. *Davis*, 583 F.3d at 1090. The privilege waived extends to both the
11 information disclosed “and related communications” *Bittaker*, 331 F.3d at 720;
12 see also *Davis*, 583 F.3d at 1090.

13 Waiver by argument occurs when a defendant puts her “lawyer's
14 performance at issue” E.g., *Bittaker*, 331 F.3d at 718 (citing *Hunt v. Blackburn*,
15 128 U.S. 464 (1888)). This rule dates back to the *Hunt* case, a seminal case on the
16 issue, where the defendant asserted a line of defense that involved what transpired
17 between herself and her attorney. *Id.* at 470. Accordingly, the court held that she
18 waived her right to object to her attorney giving his own account of the matter. *Id.*
19 at 471. Justifying this waiver is the fairness principle: It would be unfair to permit
20 a party to use “the privilege as both a shield and a sword.” See, e.g., *Bittaker*, 331
21 F.3d at 719. Thus, if the defendant holding the privilege wishes to put her
22 attorney's performance at issue and wants to litigate this claim, she “must waive
23 [her] privilege to the extent necessary to give [her] opponent a fair opportunity to
24 defend against it.” See *Id.* at 720.

25 This waiver doctrine has been applied in the context of withdrawing a plea
26 agreement. Under the federal rules, “a guilty plea may be withdrawn before
27 sentencing if ‘the defendant can show a fair and just reason for requesting the
28 withdrawal.’ ” *Davis*, 583 F.3d at 1089, cert. denied, 130 S. Ct. 1555 (2010); see

1 also Fed. R. Crim. P. 11(d)(2)(B). If a defendant asserts that a fair and just reason
2 is his counsel's erroneous advice, the defendant waives attorney-client privilege
3 because he puts his lawyer's performance at issue. *Davis*, 583 F.3d at 1090; see
4 also, *United States v. Wei Lin*, 2013 WL 12170304, at *1–2 (D.N.Mar.I., 2013).

5 In the habeas petitioner context, it is unequivocally the rule in federal courts
6 that “where a habeas petitioner raises a claim of ineffective assistance of counsel,
7 he waives the attorney-client privilege as to all communications with his allegedly
8 ineffective lawyer.” *Bittaker*, 331 F.3d at 715; *Wharton v. Calderon*, 127 F.3d
9 1201, 1203 (9th Cir. 1997) (finding that wide-ranging attacks on counsel’s
10 competence may authorize a broad waiver of the attorney-client privilege). In
11 *Lambright v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012), the court found that a
12 criminal defendant waived his attorney-client privilege at the moment he filed a
13 habeas petition calling into question the effective assistance of his counsel. *Id.* This
14 proposition is rooted in principals of fairness. *Id.* (holding that when a party alleges
15 counsel misconduct, it would be unfair to protect that party’s attorney-client
16 communications).

17 Here, the Defendant has agreed and stipulated that he has waived the
18 attorney client privilege as to this issue and has done so by both conduct and
19 argument. The Defendant has filed, albeit through his current counsel, declarations
20 which are grounded solely on the Defendant’s own proposed testimony and
21 statements. See, ECF 1278¹. The only way the statements in the declaration
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24 ¹ The United States has objected to the Defendant’s hearsay statements contained in
25 his current attorney’s declaration. Since the Defendant is offering these statements
26 himself though his attorney, they do not qualify under any “non-hearsay”
27 exception pursuant to Federal Rules of Evidence, Rule 801(d)(2) nor do they
28 qualify under any other hearsay exception. See, Fed.R.Evidence, Rule 803.

1 would be admissible as to this issue would be if the Defendant testified. Once the
2 Defendant testifies, then he has waived his attorney client privilege by conduct.
3 The Defendant has also waived his attorney client privilege by argument. The
4 Defendant's entire argument in support of his motion to withdraw guilty plea is
5 based upon an allegation of faulty advice and/or performance by his counsel,
6 concluding, "Thus, the erroneous advice Mr. Herrera Farias received constitutes
7 a fair and just basis for withdrawal of his guilty plea." ECF 1278 at 10.

8 The issue now becomes the scope of that waiver. The United States concurs
9 with counsel that the waiver must be tailored to the issue at hand however, would
10 respectfully submit the waiver is broader than suggested by counsel. The United
11 States has obtained permissions and agreement from former counsel as well as his
12 defense investigator, to appear at the hearing in this matter. However, the United
13 States seeks an Order from this Court, prior to the hearing, which would allow the
14 United States to freely communicate with former counsel and his defense
15 investigator as to the issue before the Court. The United States requests the Court
16 to order the disclosure to the United States of *all communications*, both written
17 and oral, regarding or reasonably related to Defendant's motion to withdraw his
18 guilty plea based upon his allegations of counsel's inadequate advice. *See*, Wei
19 Lin, 2013 WL 12170304, at *3.

20 This should not be limited to the morning of the change of plea as suggested
21 by counsel. *See*, ECF 1306 at 3. In order for this Court to fully assess the claim
22 and for the United States to properly prepare, *all communications* regarding any
23 change of plea, to include the review of the previously provided plea agreement are
24 directly relevant to the claims raised by the Defendant. To limit the waiver to just
25 the morning of trial, will distort the information and leave out material and relevant
26 facts.

27 The United States respectfully submits the Defendant's conduct and
28 argument have waived any privilege he has over all communications with his

1 former counsel and the investigator as to plea negotiations, discussion of proposed
2 plea agreements and any advice related to his entry of a plea of guilty over the
3 entirety of the representation. Such would adequately allow the Court and the
4 United States to properly prepare for and to defend against Defendant's motion to
5 withdraw.

6 DATED this 14th day of August, 2019.

7 William D. Hyslop
8 United States Attorney

9 *s/ Stephanie Van Marter*
10 Stephanie Van Marter
11 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The filed document will be sent via e-mail to the following:

Shea C. Meehan

s/ Stephanie Van Marter
Stephanie Van Marter
Assistant United States Attorney